Supreme Court, U.S.
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No. 01-404

IN THE

Supreme Court of the United States

WILLIE WHITE and CLARENCE MCCURDY, individually and on behalf of all persons similarly situated,

Petitioners,

v.

METROPOLITAN LIFE INSURANCE COMPANY, INC., SEARS ROEBUCK COMPANY, INC. and ALLSTATE INSURANCE COMPANY INCORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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Because the Respondent, Sears, Roebuck and Co., ("Sears") has not provided any relevant response to the issues presented by Willie White, Clarence McCurdy and all similarly situated class members (collectively "Petitioners"), and due to the lack of an opposition to the Petitioners' position from the Respondents, Metropolitan Life Insurance Company, Inc., ("MetLife") and Allstate Insurance Company ("Allstate"), the Petitioners respectfully urge this Court to grant their petition for writ of certiorari previously submitted.

I. This Court's opinion in *Variety Corporation v. Howe*, is controlling authority for the facts of this case and Sears' inability to distinguish this case and justify the lower courts' departure from its holding is grounds for certiorari review.

As the Respondent correctly identifies in its brief, the crux of the Petitioners' petition as it relates to the employer, Sears, focuses on the breach of fiduciary duty to communicate accurate and material information to the Petitioners (plan participants) regarding long-term disability benefits. In an endeavor to absolve itself from the fundamental obligation of a plan fiduciary, Sears first attempts to persuade this Court that its conduct, as it relates to the information provided to the Petitioners in this regard, is not subject to review under the fiduciary standards prescribed by the Employee Retirement Income Security Act ("ERISA").

Namely, Sears argues that it is not subject to review as a fiduciary because it has been determined that a plan sponsor who is engaged in the process of modifying, amending or terminating an employment benefit plan is not performing fiduciary activities as contemplated by ERISA. *See e.g., Lockheed Corp. v. Spink*, 517 U.S. 882 (1996); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995). However, this Court makes a distinction from

situations where a plan sponsor merely alters or amends welfare benefit plans from circumstances where a plan sponsor exercises discretionary authority or control over the plan management or administration of the plan. In the latter scenario, plan administrators are subject to fiduciary obligations and liabilities prescribed by ERISA. *Lockheed Corp. v. Spink*, 517 U.S. at 890. This Court has found that a plan sponsor exercises such discretionary authority when it communicates information regarding the future of plan benefits to plan participants. *See Variety Corporation v. Howe*, 516 U.S. 489, 505 (1996).

As stated above, the Petitioners specifically maintain that Sears, as well at the other Respondents, had a fiduciary duty to communicate complete and accurate information material to the plan and the disability benefits provided therefrom. In *Variety Corporation v. Howe*, *supra*, as in the present case, the employer made representations to the plan participants that there would be **no change in coverage** and any transfer in the administration of disability benefits would not undermine or affect the security of those benefits. *Variety*, 516 U.S. at 501. Because the record indicates that Sears actively participated in the transmission of the alleged inaccurate and misleading information regarding the change in coverage in the future administration of disability benefits owed to the Petitioners, it cannot escape responsibility and liability as a plan fiduciary.[1]

Sears next argues that even if it is subject to fiduciary standards, the Petitioners' description of its conduct does not rise to the level of culpability required by *Variety*. According to Sears' interpretation of this Court's holding in *Variety*, a

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1. Of course, Respondents, MetLife and Allstate are equally culpable parties as plan administrators and fiduciaries, even though the Petitioners have directed their response to the arguments made by the Respondent, Sears in its opposition brief.

plan participant must prove that a plan fiduciary "knowingly and significantly" deceived a plan beneficiary before having an actionable claim under the fiduciary provisions of ERISA. The Petitioners respectfully submit that there is nothing elicited in the *Variety* opinion to support such a narrow and restricted application of law. Instead, this Court in *Variety* encourages plan sponsors or administrators to exceed the statutory fiduciary obligations when communicating information about plan benefits to a plan participant.

> Administrators, as part of their administrative responsibilities, frequently offer beneficiaries more than the minimum information than the statute requires — for example, answering beneficiaries' questions about the meaning of the terms of a plan so that those beneficiaries can more easily obtain the plan's benefits. To offer beneficiaries detailed plan information in order to help them decide whether to remain with the plan is essentially the same kind of plan-related activity.

Id. at 502-03, *citing* Restatement (Second) of Agency § 229(1) (1957).

While the *Variety* decision does not address whether ERISA imposes a duty on fiduciaries to voluntarily disclose information or to respond to inquiries from plan participants, the Eleventh Circuit has determined that an employer's **affirmative misstatement** as well a **failure to disclose information** regarding long-term disability benefits could constitute a breach of fiduciary duty under ERISA. *Hamilton v. Allen-Bradley Co., Inc.*, 244 F.3d 819, 1323 (11th Cir. 2001). To justify its holding, the Eleventh Circuit Court borrowed language from the Ninth Circuit opinion of *Barker v. American Mobil Power Corp.*, 64 F.3d 1397, 1403

(9th Cir. 1995), which held that a "'fiduciary has an obligation to convey complete and accurate information material to the [plan participant's] circumstance, even when the [plan participant] has not asked for the information.'" *Hamilton v. Allen-Bradley Co., Inc.*, 244 F.3d at 1322.

For additional support for its decision, the *Hamilton* Court looked to authority established in the Third Circuit case of *Jordan v. Federal Express Corp.*, 116 F.3d 1005, 1016 (3d Cir. 1997), wherein the fiduciary was required to have "an attendant duty of loyalty which requires that he not only avoid misstatements but also 'an affirmative duty to inform . . . when . . . silence might be harmful,'" and from the Sixth Circuit case of *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154, 1163 (6th Cir. 1988), holding that "plan fiduciaries have a 'duty not to make misrepresentations either negligently or intentionally, to . . . plan participants.'" *Id.* at 1322-23.

Regardless of whether Sears' representations to the Petitioners that there would be no change in the amount of coverage under the MetLife plan constituted a mistakenly inaccurate communication, or a knowingly deliberate miscommunication, the duty and the result are the same. The content of the information was misleading to the Petitioners and they have presented evidence of their resulting injuries and damages. Again, the Petitioners submit that Sears, including the other Respondents, have failed to comply with their fiduciary obligations as plan sponsors or administrators within the spirit of *Variety* and its progeny.

Any other effort by Sears to distinguish *Variety* from this case fails to demonstrate any material differences. In fact, most of the claims by Sears concerning any distinctions are deliberately misstated and insignificant. For example, the fact that Petitioners McCurdy and White cannot verify with certainty that they received documents or reviewed films

presented by Sears, in no way precludes a claim for breach of fiduciary on behalf of the class. The record shows that this material information, inaccurately and falsely represented, was sent out and read by more than 130,000 employees, who are class members in this action. In any event, the Petitioners' reliance on the alleged misrepresentations are factual questions and not properly determined at the summary judgment level.

CONCLUSION

In consideration of the above and forgoing, including the petition previously submitted, the Petitioners respectfully request that the petition for writ of certiorari be granted.

Respectfully submitted,

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